No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1950

SAMUEL HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 22-29) is reported at 185 F. 2d 617.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1950 (R. 30), and a petition for rehearing (R. 30-34) was denied on December 27, 1950 (R. 35). The petition for a writ of certiorari was filed on January 25, 1951, and was

granted on March 12, 1951 (R. 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rule 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, a witness before a grand jury investigating violations of federal statutes, could lawfully refuse, on the asserted ground that his answers would incriminate him, to answer questions relating to the nature of his occupation, the whereabouts of a subpoenaed acquaintance sought as a witness and when he had last seen or talked with the latter, without any showing, other than the nature of the questions and proceedings, that his answers would in fact tend to incriminate him.

2. Whether the Court of Appeals, in reviewing a judgment of criminal contempt, properly disregarded facts presented by petitioner for the first time in support of a motion for reconsideration of allowance of bail filed in the District Court 15 days after the judgment of contempt and the notice of appeal.

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CRIMINAL PROCEDURE AND CIVIL PROCEDURE INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Rule 39 of the Federal Rules of Criminal Procedure (18 U. S. C., Supp. III, foll. 3771) provides in pertinent part:

(a) *Supervision in Appellate Court.*

The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion * * * for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(b) *The Record on Appeal.*

(1) *Preparation and Form.* The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

* * * * *

Rule 75 of the Federal Rules of Civil Procedure (28 U. S. C., foll. 723c) provides in pertinent part:

* * * * *

RULE 75.—RECORD ON APPEAL TO A CIRCUIT COURT OF APPEALS

* * * * *

(h) *Power of the Court to Correct or Modify Record.*

It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) [forma pauperis case] and (n) [no steno-

graphic report] of this rule and in Rule 76 [agreed statement], but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the circuit court of appeals.

STATEMENT

On September 14, 1950, a grand jury of the Eastern District of Pennsylvania undertook an investigation concerning frauds upon the Government of the United States, involving violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses (R. 2). On October 3, 1950, petitioner, appearing as a witness before this grand jury, refused to answer certain questions on the asserted ground that his answers might incriminate him of a federal offense

(R. 2, 5, 7). The questions which he refused to answer appear in the following excerpt from the transcript of the grand jury proceedings (R. 3, 5-6):

> Q. What do you do now, Mr. Hoffman?
> A. I refuse to answer.
> Q. Have you been in the same undertaking since the first of the year?
> A. I don't understand the question.
> Q. Have you been doing the same thing you are doing now since the first of the year?
> A. I refuse to answer.
> Q. Do you know Mr. William Weisberg?
> A. I do.
> Q. How long have you known him?
> A. Practically twenty years, I guess.
> Q. When did you last see him?
> A. I refuse to answer.
> Q. Have you seen him this week?
> A. I refuse to answer.
> Q. Do you know that a subpoena has been issued for Mr. Weisberg?
> A. I heard about it in Court.
> Q. Have you talked with him on the telephone this week?
> A. I refuse to answer.
> Q. Do you know where Mr. William Weisberg is now?
> A. I refuse to answer.

Later on the same day, October 3, petitioner and his counsel appeared in open court before the District Court (Ganey, D. J.), and the Government challenged petitioner's claim of privilege (R. 2, 5). The court, after hearing the questions and answers *supra*, and after hearing argument by

petitioner's counsel,[1] found that "there was no real and substantial danger of incrimination to [petitioner] for a Federal offense" and ordered him to reappear before the grand jury and answer the questions (R. 5).

On the following day, October 4, 1950, petitioner and his counsel again appeared in open court before Judge Ganey. It appears that the judge at that time permitted counsel to renew his argument of the preceding day in support of his claim that petitioner's refusal to answer the questions was based on a proper claim of privilege. The gist of the argument appears in the following excerpt from the transcript (R. 17-19):

> Mr. Gray [counsel for petitioner]: * * * while Your Honor was, and you always are, sir, extremely patient in listening to the presentation I made yesterday in the matter, I would like to emphasize one fact that I put yesterday to Your Honor, and that is when this man was asked what was his business, I argued to Your Honor that he would have the right to refuse to answer on the ground that it might incriminate him of a Federal offense. I now put the hypothetical question to Your Honor, suppose this man was engaged in counterfeiting?
>
> If he answers the question, he answers it truthfully, and if he does not answer it truthfully, he will be subjected to the penalties of

[1] The argument made by counsel on October 3 is not contained in the printed record, except by indirect newspaper report at R. 13. Extracts from counsel's argument of the following day are set forth, *infra*, pp. 6-9.

perjury. If he answers it truthfully, he certainly is incriminating himself of having been guilty of an offense under the United States Law.

* * * * * *

Mr. Goldschein [Counsel for the Government]: I think, may it please the Court, that before a witness can be given privilege against self-incrimination that the obvious answer to the question must be such that the Court can determine from the question, if the question is answered in the affirmative, that it would incriminate him. Other than that, the witness must give the Court sufficient so that the Court can determine.

The Court: Yes, I think that is right. I ask, what is your job——

Mr. Gray: May I say, before that——

The Court: Excuse me, Mr. Gray. That may be laid in an environment and under such circumstances from which the only inference that can be drawn—I cannot say that he is a counterfeiter—I think I have the right to presume he is engaged in a lawful occupation.

Mr. Gray: My friend does not answer the question and Your Honor does not answer it. Suppose the man is in the counterfeiting business. He is asked the question, What is your business?

He knows he is a counterfeiter; it is his only business; he cannot answer the question because it would incriminate him. What can he say? He cannot say, "I refuse to answer the question because I am in the counterfeiting business, or I refuse to answer the question because it might incriminate me under the Federal laws; he happens to be a counterfeiter. What are you going to do about that?

The Court: I know, but the whole background—I think it must be laid in a back-

ground from which the Court can glean that he is in the counterfeiting business. The mere asking of the question, "What business are you in?"——

Mr. Gray: Well, he is in the counterfeiting business.

The Court: —does not warrant the assumption that he is in the counterfeiting business. He may be in the counterfeiting business. I have to go one step further, don't I, and make the assumption, don't I, that he is in the counterfeiting business or may be——

Mr. Gray: No, not at all. He is actually in the counterfeiting business. He is actually in the business.

The Court: I don't know that.

Mr. Gray: You don't know that, but he knows it in his own mind. How is he going to do more than say, "I refuse to answer on the ground that it may incriminate me"? He cannot explain that he is in the counterfeiting business, and that is why it would incriminate him, because he is then incriminating himself.

The Court: All right, let us take myself. Suppose I were summoned before the Grand Jury; they say, "What is your business?" I say, I refuse to answer on the ground of self-incrimination.

Mr. Gray: Your illustration——

The Court: I don't know. I don't know what Hoffman does.

Mr. Gray: Your illustration is not very good. It has been broadly published that this man has a police record——

The Court: I don't know it.

Mr. Gray: —that he is not a character that belongs on the bench, or a character that belongs at the bar.

The Court: That I really don't know.

Mr. Gray: Wait; that is no answer to the fact that he may be in the counterfeiting business, and being in the counterfeiting business, if he makes any other explanation than refusal to answer on the ground that it may incriminate him——

The Court: You say it is widely known—has it been in the newspapers that he is in the counterfeiting business?

Mr. Gray: No, sir.

The Court: I am going to sustain——

Mr. Gray: Will Your Honor allow this argument to be made of record the same as yesterday?

The Court: Yes, sir; yes, indeed.

Mr. Gray: Will Your Honor allow something else to be placed on record? I don't know that it is there—that there has been a subpoena issued for Weisberg some several weeks ago and that he has not appeared in answer to the subpoena?

The Court: If that is the fact.

Mr. Goldschein: Those are facts.

On the same day, October 4, 1950, petitioner "stated in open Court in the presence of his counsel that he would not obey the order of [the] Court and answer the questions which the Court directed him to answer" (R. 3, 6). Accordingly, on the following day, October 5, 1950, upon petition of the Government (R. 2-4), Judge Ganey entered an order under 18 U. S. C. 401 and Rule 42(a), F. R. Crim. P. (R. 4-6) finding that petitioner had been "guilty of a contempt of [the] Court by misbehavior in its presence and by a forcible resistance in the presence of the Court to a lawful Order

thereof" (R. 6). After reciting in the order the facts as heretofore summarized (R. 5-6), Judge Ganey found petitioner guilty of criminal contempt committed on October 3, 1950, and sentenced him to five months' imprisonment (R. 6).

On the same day, October 5, 1950, petitioner filed a notice of appeal. Bail pending the appeal was denied (R. 1). On the following day, October 6, the entire record of the proceedings in the district court was sent to the Court of Appeals, where it was docketed on October 11 (R. 20).

On October 20, 1950, petitioner filed in the district court a "Petition for Reconsideration of Allowance of Bail Pending Appeal" (R. 1, 7-8). Attached to this petition as an exhibit was an affidavit (R. 9-15) executed by petitioner on the preceding day. Petitioner averred in the petition "that on the basis of the facts contained in his affidavit * * * he was justified in his refusal to answer the questions as aforesaid, or, in any event, that there is so substantial a question involved that [petitioner] should be released on bail * * *. Wherefore, your petitioner prays that he be released on bail pending his aforesaid appeal" (R. 8). In the affidavit, petitioner stated, *inter alia:* that when he refused to answer the questions he assumed that both the grand jury and the court "were cognizant of, and took into consideration, the facts on which he based his refusals to answer," that he had "since been advised, after his

commitment, that the Court did not consider any of said facts" and "considered only the bare record" [only the questions and answers]; that in "the interest of justice and particularly in aid of a proper determination of" the petition for allowance of bail, he submitted "the following in support of his position that he genuinely feared to answer the questions * * *"; that the investigation "was stated, in the charge of the Court to the Grand Jury, to cover 'the gamut of all crimes covered by federal statute' "; that petitioner had "been publicly charged with being a known underworld character, and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge"; that, "while waiting to testify before the Grand Jury, [he] was photographed with one Joseph N. Bransky, head of the Philadelphia office of the United States Bureau of Narcotics"; that he "was questioned concerning the whereabouts of a witness who had not been served with a subpoena and for whom a bench warrant was sought by the Government prosecutor" and that on "the basis of the above public facts as well as the facts within his own personal knowledge, [petitioner] avers that he had a real fear that the answers to the questions asked by the Grand Jury would incriminate him of a federal offense" (R. 9-10).

In support of these averments petitioner attached, as appendices to his affidavit, several news-

paper clippings (including the photograph re-referred to) (R. 11-15).[2]

On October 23, 1950, following a hearing in the district court, petitioner's motion for reconsideration of the order refusing bail was granted, and he was ordered released on $10,000 bail pending appeal (R. 1, 20). On the following day, October

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[2] The first of these clippings (R. 11) bore the handwritten date "9/14/50". The name of the newspaper was not indicated. It bore headlines "Gambler Called in Racket Probe" and "Cappy Hoffman among First Three Witnesses." It stated, *inter alia:*

"Samuel (Cappy) Hoffman, a gambler with a 20-year police record, and two other witnesses [Segal and Lit, not identified as criminals] were summoned today before the federal grand jury investigating rackets * * *. Goldschein said they and Hoffman would be questioned about gambling. * * * Hoffman's record includes a conviction and prison sentence on narcotics charges, an acquittal for murder, and innumerable arrests on gambling charges.

"His early operations were out of Atlantic City and he was once described by top Philadelphia police officials as 'the king of the shore rackets who lives by the gun.'

"*Named With Nig Rosen*

"More recently they named him and Nig Rosen as two of the men trying to 'organize' the numbers racket in this area. Last August, the Senate crime investigating committee put Hoffman's name on a list of 'known gangsters' from the Philadelphia area who made the Sands Hotel, Miami Beach, their headquarters.

"Hoffman's murder acquittal was in 1942 at Mays Landing. A jury found him not guilty of the murder of Michael Tenerelli, alias Mickey Blair, a former fighter, who was shot six times in the back outside his Pleasant Bay Inn in Atlantic City. Hoffman charged he was 'framed.'

* * * * *

"Goldschein said that the investigation will include allega-

24, a "Supplemental Record," consisting of the above-mentioned "Petition for Reconsideration of Allowance of Bail Pending Appeal," the supporting affidavit, and the appendices thereto, consisting of the news items, and additional docket entries were filed in the Court of Appeals (R. 20-21).

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tions made against one GI school and veterans attending another.

* * * * *

"The investigation is to run the full gamut of all the rackets, including illegal drugs, bootlegging, gambling, smuggling, white slavery, and their offshoots.

"Goldschein said that 20 subpoenas were in the first batch to go out, but that nine of these remain unserved.

" 'We are having trouble finding some big shots,' he said."

The clipping from the Sunday Bulletin, September 24, 1950 (R. 14) contained a picture showing petitioner with the head of the local U. S. Bureau of Narcotics, and referred to petitioner as an "erstwhile bigtime gambler" shown in a "who me?" vein. The clipping marked "9/29/50" (R. 15) dealt with Government efforts to obtain bench warrants for a number of persons, including Weisberg. The clipping quoted attorney Gray (petitioner's counsel) as opposing the issuance of the warrants, and as stating, "Just because [Government counsel] says he cannot find a man, it doesn't mean that the man is evading him, nor is it grounds for 'bench warrant.' "

A clipping marked "10/3/50" (R. 13), a clipping marked "10/4/50" (R. 12), and another clipping of apparently the latter date (also R. 12) reported petitioner's refusal to answer questions on October 3, 1950, referring to petitioner as "long known to police as an underworld character" and adverting to petitioner's "prison sentence on a narcotics charge, an acquittal on a murder charge, and numerous arrests for gambling." The clipping of October 3 (R. 13) also reported petitioner's counsel to have argued that "the line of questioning * * * might eventually involve income tax matters."

On November 3, 1950, the Government filed in the Court of Appeals a motion to strike this "Supplemental Record" and the additional docket entries from the record on appeal (R. 20-21), on the ground that the "Supplemental Record" was "not offered nor considered by the District Court in the consideration of the merits of the cause, and was considered by the Court below for only one purpose, namely, bail pending appeal, and after the appeal had been taken and after the entire record had been filed in this Court" (R. 21). On December 8, 1950, the motion to strike was granted by the Court of Appeals (R. 21). On the same day, the court affirmed the contempt conviction (R. 30). The decision of the court was unanimous in granting the motion to strike (R. 21, 28) and in holding that petitioner's refusal to answer the questions relating to Weisberg constituted contempt (R. 25-26). A majority of the court (Goodrich and Kalodner, JJ.) were of the view that petitioner's assertion of the privilege against self-incrimination had also been unwarranted with respect to the question as to occupation (R. 29). Judge Hastie, who wrote the single opinion of the court, agreed with the majority that petitioner's claim of privilege was not valid with respect to the questions relating to Weisberg (R. 25-26) but disagreed with respect to the questions concerning petitioner's occupation (R. 28-29).

On December 21, 1950, petitioner filed a petition for rehearing (R. 30-34) asking, *inter alia*, the opportunity to argue for a remand of the case to the district court to permit petitioner to present to the district court the data contained in the petition with respect to bail "in a motion for reconsideration of the sentence" (R. 31). The petition was denied on December 27, 1950 (R. 35).

SUMMARY OF ARGUMENT

The petitioner refused to answer two groups of questions, the first group relating to the nature of his occupation, the second to the whereabouts of Weisberg. It is the government's contention that he was properly ordered to answer both groups of questions. However, the court's finding that he was in contempt was not based on any particular question, but on his refusal to obey the court's order to answer them all. The judgment should be sustained, therefore, if the claim of privilege was invalid as to either group of questions since the petitioner's failure to obey the court's order where he had no privilege cannot be excused because he was justified in refusing to answer other questions. Petitioner's sentence of five months' imprisonment was a general sentence which was within the court's discretion to impose if he was properly held in contempt in any respect.

1. When a witness asserts his Constitutional privilege not to incriminate himself, and where the

question is not incriminating on its face, the issue arises whether his bare assertion that his answer will tend to incriminate him is sufficient. The answer to literally any question may in some circumstances be incriminating and therefore, there would be an end to the compulsion on witnesses to testify at all if some support were not required for the bona fides of the claim. It is now generally held that in such cases the witness must make a showing that under all the circumstances there is a real danger that the answer may incriminate him.

The application of this requirement that the witness make a showing as to the reality of the danger is particularly important when the question calls for an answer which witnesses may customarily give without implicating themselves. The questions put to the petitioner with respect to his occupation were of this nature since they are of the type customarily asked to identify and qualify a witness, even though it is possible that, if his business was, for example, the sale of narcotics, he could not answer without disclosing a federal offense.

Since the answer to the questions asked petitioner would not in ordinary circumstances involve incrimination, it was incumbent on petitioner to make some showing that as to him there was a real likelihood of danger in answering them. Care must then be taken, however, not to require

a showing which would vitiate the privilege. But in the absence of such showing there is no way in which a court can determine whether a claim is made in good faith. In the present case, no showing whatsoever was made. The court had no possible way of knowing whether petitioner was a potential defendant in a federal criminal case, or whether he had merely been called to give evidence which would be helpful in tracking down others. Under these circumstances it is submitted that the court quite properly held that he had not established the bona fides of his claim and was therefore not justified in refusing to answer.

2. The questions asked with respect to his contacts with Weisberg could not call for answers which would disclose an element of a crime. The greatest harm that they could do the witness would be to establish that he had had the opportunity to conspire with Weisberg to obstruct justice. But the court below properly held that the witness had not show any circumstances indicating that there was any real danger to him on that ground. There was no evidence that Weisberg was avoiding the service of a subpoena and, in fact, he later appeared. The refusal to answer the question as to Weisberg's whereabouts was equally without foundation and equally remote from any apparent danger to the witness. On the facts presented it could only appear to the Court that the witness was attempting to hide behind the privilege in or-

der to shield another. This is, of course an improper ground for asserting the privilege.

Petitioner now argues that his refusal to answer the questions about Weisberg lost significance when the latter subsequently appeared and testified. This argument loses sight of the fact that the conviction was for criminal contempt and that the contempt had been completed and the petitioner tried and sentenced before Weisberg made his appearance.

It should also be noted that the supplemental record, which the Court of Appeals refused to consider in reviewing the conviction, would not, even if properly before the court, have materially aided the petitioner in supporting his claim with reference to this group of questions.

3. Petitioner asserts that the showing which he made before the district court in connection with an application for reconsideration of bail pending appeal should have been considered by the Court of Appeals in reviewing the conviction for contempt or, at least, that the case should have been remanded to the district court in order that it could have reconsidered the convictions on the basis of the additional showing.

The material was submitted to the district court on a bail application after the completion of the contempt proceeding, after the time for a motion for a new trial had expired, after appeal had been taken, and after the record had been forwarded to

the Court of Appeals and the appeal docketed. It was never considered by the district court on the question of whether the petitioner was in contempt. Obviously since it was not part of the record on which the petitioner had been convicted, it was not a part of the record on which the Court of Appeals could review the correctness of the conviction.

Nor was the additional information a proper ground for a remand to the district court. Courts of appeals do not order district courts to retry cases merely because appellants believe that they can make a better case by introducing different or additional evidence than that which they chose to present on the original trial. Law suits would never be concluded if that were the situation. If the evidence were newly discovered, petitioner could move for a new trial at any time within two years of the conviction, but the application would clearly have to be made to the district court, not to the Court of Appeals. Petitioner's attempt to frame his issue as one involving a waiver of consitutional rights is without foundation, since his constitutional rights were in fact stoutly asserted throughout and the only question involved is whether he should have been given the chance to retry his case.

ARGUMENT

The questions asked the petitioner fall into two groups, (a) the questions as to the nature of the witness's business and (b) the questions as to his contacts with, and the whereabouts of, Weisberg. The answers to the first group might incriminate a witness in the unforeseeable circumstance that his business was itself illegal under federal law. The answers to the second group could, at most, disclose evidence which could conceivably be used to prove some unspecified collateral fact involved in a later prosecution for some unidentified offense.

The privilege against self-incrimination was construed in the proceedings against Aaron Burr to protect a witness against disclosure of "a fact that would form a necessary and essential part of a crime which is punishable by the laws." *United States* v. *Burr*, 25 Fed. Cas. 38, 40, No. 14,692e. This construction was seemingly extended in *Counselman* v. *Hitchcock*, 142 U. S. 547, 585, by the following language:

> * * * It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him."

The most recent statement of this Court on the scope of the protection afforded is found in *Blau* v. *United States,* 340 U. S. 159 at 161:

> * * * Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent.

Accepting these principles, we believe the issue in this case is whether a witness can refuse to answer questions which on their face do not call for incriminating answers without making any showing to justify the court in finding that his claim of privilege is bona fide rather than a sham to avoid answering questions for some ulterior reason. The issue is an important one because the right of the State to compel witnesses to disclose information which may be necessary to the administration of justice should not be impaired to any extent that is not necessary to protect witnesses whose answers would place them in actual jeopardy. Abuse of the privilege must be discouraged in order that it not be debased.

One preliminary matter requires brief discussion before turning to the merits of the case. The

petitioner refused, after being ordered to do so by the judge, to answer six specific questions. The petition that he be held in contempt was based on all of the questions (R. 3), and the court's finding that the witness was in contempt was similarly based on his refusal to answer each of them (R. 6). The conviction should be sustained, therefore, if the claim of privilege was invalid as to any of the questions since the petitioner's failure to comply with the court's order to answer any one of them as to which he had no privilege cannot be excused because he was justified in refusing to answer other questions. Petitioner's sentence of five months' imprisonment was a general sentence which was within the court's discretion to impose if he was properly held in contempt in any respect. See *Pinkerton* v. *United States*, 328 U. S. 640, 641, n. 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Blau* v. *United States*, 340 U. S. 332, 335 (dissenting opinion).

I

THE WITNESS DID NOT MAKE A SUFFICIENT SHOWING OF THE DANGER OF SELF-INCRIMINATION TO JUSTIFY HIS REFUSAL TO ANSWER THE QUESTIONS CONCERNING THE NATURE OF HIS OCCUPATION.

The questions put to the petitioner as to the nature of his occupation were, on their face, wholly colorless. They are the very type of questions al-

most invariably asked of all witnesses in order to identify them and to aid the jurors or the courts in evaluating the testimony to follow. There is no implication from the questions themselves that the answers will be anything but routine. If witnesses were permitted to refuse to testify solely on their bare claim of privilege there would be nothing to prevent recalcitrant witnesses from hiding behind the privilege against self-incrimination whenever they were disinclined to answer a question for any reason whatsoever.

The courts in this country were early faced with the problem of how to distinguish between a *bona fide* claim of privilege and an attempt to use the privilege for ulterior reasons. In 1807 Chief Justice Marshall laid down the following test (*United States* v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,692e, pp. 38, 40):

> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be.

In that case Burr's secretary was called by the government to identify a letter written in cipher.

He refused to answer a question as to whether he understood the cipher at the time the question was asked. The conclusion of Chief Justice Marshall was that the answer would not incriminate him since it only asked for his present knowledge, rather than knowledge at the time he was alleged to have copied the letter. The latter, the court believed, would have implicated him in the charge of treason. However, it is obvious that under certain circumstances, even the witness's present knowledge might implicate him since it might have been derived from knowledge at the time he made the copy. It seems probable that if the witness had stated that any knowledge he presently had was the same as that he had at the time of the copying, his plea of privilege would have had to be upheld for he would then have provided the court with the additional circumstances that there was a real danger that his answer would incriminate him. In the absence of that showing the witness was required to answer.

Later cases have made explicit what was implicit in the *Burr* decision, namely, that whenever it does not appear from the nature of the question, or the evidence already before the court at the time the question is asked, that the answer may imperil the witness, then, even though it is possible that the answer can incriminate the witness, his bare claim of the privilege is not sufficient. The witness must go further and indicate in some way that his

claim has a real foundation in fact, and is not made in bad faith. A case frequently cited as expounding this rule is *The Queen* v. *Boyes,* 1 B. & S. 311, 121 English Reports (Full Reprint) 730 (1861). Cockburn, C.J., there stated at 329-330:

> * * * It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive.
>
> With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale, in *Osborn* v. *The London Dock Company,* 10 Exch. 698,701, and acted upon by V. C. Stuart, in *Sidebottom* v. *Adkins,* 3 Jur. N. S. 631, is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

This language has been quoted with approval by this Court in *Brown* v. *Walker,* 161 U. S. 591, 599-600, and in *Mason* v. *United States,* 244 U. S. 362, 365. Professor Wigmore refers to the decision by Mr. Justice Mitchell in *State* v. *Thaden,* 43 Minn. 253, 45 N. W. 447 (1890), which in turn adopts the rule expressed in *The Queen* v. *Boyes,* as one

which "leaves nothing to be added, and [which] ought to remain the last word in the development of the rule." *VIII Wigmore on Evidence* (3rd ed. 1940) 406.

This is the rule which the court below adopted, although the judges divided on its application. The court stated (R. 27):

> The claimant of privilege must show the court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless, a contumacious assertion made in bad faith.

The only difficulty in applying the test is not whether the showing must be made, but how far the witness must go in order that the showing can be considered sufficient. This difficulty was well expressed by Judge Learned Hand in *United States* v. *Weisman*, 111 F. 2d 260, 262:

> Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

At the time the witness in the present case was found in contempt the trial court had been pre-

sented with no circumstance, other than the nature of the grand jury proceedings, which could serve to buttress the claim of privilege. The majority of the court below believed that the nature of the proceeding was not enough since, so far as it appeared, the witness might well not have been a person implicated in any crime but an innocent outsider whose testimony might be helpful in tracking down the subjects of the investigation. Obviously many, perhaps most, witnesses called before juries are sources of information rather than potential defendants. Therefore, the majority of the court held that in order to avoid answering the colorless questions about his occupation, the witness must present some substantial basis on which the court could determine that the answers to the questions might put him in danger of prosecution.[3]

Judge Hastie, disagreeing with the majority, felt that the facts that the grand jury was investigating racketeering and federal crime, and that there is a class of persons who make their living through activities prohibited by federal law, were

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[3] Hypothtical assumptions by his counsel on oral argument before the court cannot be deemed a showing of circumstances. Counsel's statements that the witness might have been a counterfeiter were intended to point up his legal proposition, not to establish a factual background. Moreover, as was indicated in *United States* v. *St. Pierre*, 128 F. 2d 979, 981 (C. A. 2), the court "must be apprised, in some more dependable manner than the mere statement of counsel, how the answer will incriminate the witness before he can allow the suppression of the truth."

enough to indicate to the court the likelihood that the privilege was claimed in good faith. This position goes further than is necessary in the circumstances to protect the witness. It is entirely possible that the witness's claim was based not on the inherently illegal character of his business, but on his fear of disclosing an offense punishable under state law or the possibility that an income tax violation might be alleged because of his failure to disclose income received from a business not prohibited by federal law. It has been held that neither of these grounds is sufficient.[4] In *United States* v. *Greenberg*, 187 F. 2d 35 (C. A. 3) (petition for certiorari pending, No. 586), questions very similar in purport to those here involved were asked, but the witness's claim of self-incrimination was specifically grounded on the fact that his answer might involve him in a prosecution for violation of the withholding provisions

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[4] Illegality of his business under state law would not support his claim since this Court has definitely determined that the privilege provided by the Fifth Amendment relates only to incrimination with respect to federal offenses. *United States* v. *Murdock*, 284 U. S. 141, 148; *United States* v. *Murdock*, 290 U. S. 389, 396; *Feldman* v. *United States*, 322 U. S. 487.

It has also been held that a witness may not refuse to disclose the nature of his business merely because the method in which he has conducted his business may have involved a violation of the federal tax laws. *United States* v. *Weinberg*, 65 F. 2d 394 (C. A. 2), certiorari denied, 290 U. S. 675; *Camarota* v. *United States*, 111 F. 2d 243 (C. A. 3), certiorari denied, 311 U. S. 651.

of the income and social security tax laws. The court, of which Judge Hastie was a member, held unanimously that the claim should not be allowed. It would indeed be anomalous if a naked claim of privilege were upheld, whereas a non-incriminatory disclosure of the basis of the claim were to lead to the opposite result. The two cases illustrate that invalid claims can be uncovered without impairment of the witness's fundamental rights.[5]

Actually, in the present case, the petitioner has himself given the answer as to how he could have shown additional circumstances which would have satisfied the court below as to the basis on which he was claiming the privilege. In his petition for reconsideration of allowance of bail pending appeal, he set forth facts that indicated that he might well have been one of the subjects of the grand jury investigation. The exhibits attached to his petition indicated that he had "been publicly charged

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[5] It would seem appropriate for trial judges to exercise initiative in exploring the grounds for the claim of privilege. Even though the witness or his counsel fail to suggest the circumstances on which the claim is based (perhaps in some cases because it is to their advantage not to do so), the trial judge can make general inquiries of the parties which will negative unsound grounds for the assertion of the privilege and aid him in determining whether there is any real basis on which it should be upheld. In appropriate cases he can also examine the grand jury minutes and, perhaps, even question the witness in his chambers.

with being a known underworld character, and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge." A picture attached showed him waiting to testify before the grand jury in the company of the head of the Philadelphia office of the United States Bureau of Narcotics. The picture shows him pointing at himself and the caption under it states that he appears in a "who me?" vein, which might indicate that he was being accused. We shall discuss in Point III, *infra*, whether the court below properly refused to consider this material. The point we make now is that this particular witness, without endangering himself in any way, could have presented circumstances which the court below indicated would have satisfied it that he had real reason to fear incrimination (R. 28).

It is true that not all witnesses would be able to show the circumstances supporting their claims of privilege in the same way. But if they have criminal records, it cannot incriminate them to disclose them; if they are being subjected to a current investigation, they can say so; if their associates have been accused of violations, they can bring that to the attention of the court. The very least that they can do is to indicate whether what they fear is that the nature of the business involves a federal criminal offense or whether the type of business is only indirectly involved.

The witness in the present case did none of these things. If his right to the privilege had been upheld, it would stand for the proposition that a bare claim to privilege during a grand jury investigation, without more, suffices. Courts in the past have always been able to find some method by which more could be shown to establish the bona fides of the claim without imperiling the witness. In this case the petitioner has demonstrated that more could have been done. Therefore, it is submitted that the court below arrived at a sound conclusion in determining that the privilege was not properly claimed.

II

The Witness Did Not Make a Sufficient Showing of the Danger of Self-Incrimination to Justify His Refusal to Answer the Questions With Respect to Weisberg.

The four questions dealt with in this portion of the brief are: 1) "When did you last see him [Weisberg]?"; 2) "Have you seen him this week?"; 3) "Have you talked with him on the telephone this week?"; and 4) "Do you know where Mr. William Weisberg is now?" The witness refused to answer all four questions on the ground that the answers might incriminate him of a federal offense (R. 7). The court ordered him to answer, and held him in contempt when he again refused.

The only facts before the judge at the time of the refusal to testify were: 1) A subpoena had been issued to Weisberg to appear before the grand jury but he had not appeared (R. 19). 2) The grand jury investigation in which the subpoena had been issued and in which the petitioner was being questioned was an investigation of a wide range of federal crimes. (R. 2). There was nothing before the judge to indicate that Weisberg was evading process; indeed he later appeared and testified (R. 31). The court had no reason whatsoever to conclude that to talk with Weisberg (whom the witness admitted having known for twenty years) (R. 3) or to know of his whereabouts could reveal any crime or disclose any link of evidence necessary to convict the witness. From the facts before it, the court could only conclude that the witness was attempting to shield Weisberg from the necessity of appearing and testifying.

It is, of course, well settled that the privilege against self-incrimination is for the protection of the witness alone and that the desire to shield others is not a proper ground for a refusal to testify. *Rogers* v. *United States,* decided February 26, 1951, p. 4 of slip opinion; *United States* v. *Murdock,* 284 U. S. 141, 148; *Hale* v. *Henkel,* 201 U. S. 43, 69-70; *Brown* v. *Walker,* 161 U. S. 591, 609.

Petitioner urged below (R. 25) and again urges in his brief here (Br. 13) that the witness's refusal to answer these questions was based on his fear

that by so doing he would furnish a link in the chain of evidence for a future prosecution for conspiracy to obstruct justice under Sections 371 or 1501 of the Criminal Code. Assuming that this was the basis for his apprehension, his claim of privilege was properly overruled for two very good reasons. First, he utterly failed to present to the court any circumstances from which the court could determine the basis of his claim and therefore whether it was advanced in good faith or for an ulterior purpose. Second; on the basis of the standards customarily applied, even if the court had been advised as to the basis of the claim, the incriminatory factor in the answers to the questions propounded was so minute and remote that in the exercise of sound judicial discretion the court would in any event have rejected the claim.

We have already discussed the necessity of the witness's establishing a basis for his claim in Point I. But it is even more apparent that there is a necessity for partial disclosure in such a case as this where there is no clue from the questions themselves as to how the witness may be placed in danger by answering. At the same time there is less danger in making a partial disclosure since the questions do not call for an answer which can disclose any essential element of a crime.

If the courts did not require a showing of the circumstances in the case of such innocent questions as these, there would quite literally be an

easy escape to any witness from compulsion to answer any question; for it is possible to conceive of situations in which the most harmless question can evoke an answer which could be used against the witness. In *Ex Parte Irvine,* 74 Fed. 954, 960, (C. C. S. D. Ohio, 1896) Taft, J., pointed this out:

> It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

United States v. *Weisman,* 111 F. 2d 260 (C. A. 2) affords an example of questions which bear on their face no indication of the incriminating nature of the answers. The witness was asked whether he had received cables at a certain restaurant and whether he knew any one in Shanghai. The witness then offered evidence to show that the government was conducting a prosecution for importing narcotic drugs from Shanghai and that cables addressed to a certain individual at the named restaurant were involved. The court held

that these circumstances met the necessity and that the claim should have been respected.

More recently, the questions involved in *United States* v. *Rosen*, 174 F. 2d 187 (C. A. 2), certiorari denied, 338 U. S. 851, were certainly innocuous on their face since they dealt only with what appeared to be a legitimate purchase of a Ford automobile. The court stated that the burden was on the witness to justify his refusal to answer by making it appear that there was substantial reason to believe that the answers might incriminate him. This was accomplished to the satisfaction of the Court of Appeals by tying the transaction in with an alleged Communist espionage plot.

In the present case however, the witness came forward with no showing of how the answers might incriminate him and on that ground alone his claim was properly denied.

It need scarcely be pointed out that the questions, far from indicating an effort to ascertain petitioner's crimes, had the obvious purpose of locating Weisberg so that his testimony might be obtained. This is not denied, but in fact admitted, by petitioner. (R. 31.)

But even if we assume that the court through some undisclosed method had been able to ascertain the circumstances now pressed by the petitioner and had understood that the basis of the witness's claim was that his statements might be used against him in a subsequent prosecution for

conspiring with Weisberg to obstruct justice, the evidence is so far removed from the elements of the crime that the claim still should have been disallowed. Assume, for the argument, that the direct answers to the questions would have been that he had seen Weisberg within the week, had talked with him on the telephone, and that Weisberg was then in Mexico. The fact that the conversations took place, and that Weisberg was in Mexico, which were the only answers called for by the questions, would hardly advance the Government's case appreciably. These facts are certainly less directly connected with any crime than whether Willie understood the cipher in *United States* v. *Burr,* 25 Fed. Cas. No. 14,692e, or whether the witness had seen others sitting at the table with him in the act of gambling in *Mason* v. *United States,* 244 U. S. 362, both of which questions were required to be answered.

The following decisions afford further examples of questions which have been required to be answered: *Camarota* v. *United States,* 111 F. 2d 243 (C. A. 3), certiorari denied, 311 U. S. 651 (questions as to sale of wire service to "horse rooms," although possible further questions as to amounts thus received might have evidenced federal income tax violations); *United States* v. *Flegenheimer,* 82 F. 2d 751 (C. A. 2) (question asked D in tax prosecution of F "Do you know H?", that being alias of F); *United States* v. *Weinberg,* 65 F. 2d 394

(C. A. 2), certiorari denied, 290 U. S. 675, questions asked W, in liquor violation prosecution of F, whether signature on bank card was his own, and as to business in which engaged); *United States* v. *McGovern,* 60 F. 2d 880, 881-882 (C. A. 2), certiorari denied, 287 U. S. 650 (questions as to payments of money to certain union officials); and *O'Connell* v. *United States,* 40 F. 2d 201 (C. A. 2), certiorari dismissed per stipulation of counsel, 296 U. S. 667 (questions in a lottery investigation, as to whether witness was acquainted with certain persons "presumably * * * thought by the grand jury to have some connection with the [lottery] pool," p. 204).

The constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike* v. *United States,* 227 U. S. 131, 144. The duty of determining whether the danger is real or fanciful is primarily for the trial judge, as this Court stated in *Mason* v. *United States,* 244 U. S. 362, 366:

> The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject.

> Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

In order to support the apparent weakness of his case in this respect, petitioner goes on to suggest that even though the direct answers would not themselves have been incriminating, nevertheless, the next series of questions and answers would have been (Br. 13).[6] It is futile to speculate what the succeeding questions would have been, but, since the Government was quite properly trying to locate Weisberg, and since the subsequent question actually asked was, "Do you know where Mr. William Weisberg is now?", it cannot be assumed that an attempt was being made to trip the petitioner into an admission of a conspiracy, but rather to ascertain whether he had been informed where Weisberg could be found. Whatever the next question might have been, the contempt was committed with respect to the specific questions which were in fact asked. It is well established that the courts must decide whether to allow a claim on the basis of the particular questions asked, not on what the witness anticipates will follow. *Camarota* v. *United States,* 111 F. 2d 243, 245 (C. A. 3), certiorari denied, 311 U. S. 651;

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[6] The court's finding that there would be no incrimination would *per se* eliminate any contention that petitioner would effect a waiver by answering. There would therefore be no difficult problem for the witness as to when to stop. His answer that he had spoken to Weisberg would not require him to disclose any criminal aspects of the conversation.

United States v. *Flegenheimer,* 82 F. 2d 751, 752 (C. A. 2); *O'Connell* v. *United States,* 40 F. 2d 201, 204 (C. A. 2).

The petitioner cites *Doran* v. *United States,* 181 F. 2d 489 (C. A. 9) and *United States* v. *Cusson,* 132 F. 2d 413 (C. A. 2) as being in conflict with the decision below. Both cases are clearly consistent with our position in that circumstances were brought to the courts' attention that indicated that conspiracies to obstruct justice were alleged to be involved. Thus although the questions were not dissimilar to those asked in the present case, the courts were given sufficient facts so that they could determine that the answers might endanger the the witnesses. The cases dealing with relationships with, or knowledge of, Communists which are cited by the petitioner do not support his position. *Blau* v. *United States,* 340 U. S. 159; *Estes* v. *Potter,* 183 F. 2d 865, 867 (C. A. 5), certiorari denied, 340 U. S. 920; *Alexander* v. *United States,* 181 F. 2d 480 (C. A. 9). Sufficient circumstances were presented to the courts in each of these cases to indicate that the government was attempting to identify Communist Party officials and to locate membership lists. In view of the prosecutions which were pending in New York under the Smith Act it was held that the answers to the questions would furnish a link in the chain of evidence necessary to prosecute the witnesses themselves for violations of the Smith Act.

It should be noted that the additional showing made in the petition with respect to bail (discussed in Point III) would have added nothing to the showing made as to these questions at the time of the contempt hearing. The witness's reputation as an underworld character has no connection with the questions with respect to Weisberg's whereabouts. The fact that the government had requested a bench warrant for Weisberg was already known to the court since the application had been to the very judge sitting at the time of the contempt hearing; it had been opposed on the ground that there had been no showing that Weisberg was evading service of the subpoena. (R. 15) The opinion of the court below that the showing, if made at a proper time, would have been sufficient to sustain the claim of privilege was addressed specifically to the questions relating to the witness's occupation and had no reference to the questions under consideration (R. 28). The court made no such observation in discussing the questions as to Weisberg (R. 25-26).

Finally, petitioner makes the contention that the existence of privilege with respect to the refusals to testify concerning Weisberg was "really moot" since Weisberg voluntarily appeared before the grand jury. (Br. 10) Weisberg appeared after petitioner's commitment but before the motion for bail and argument on appeal (Pet. 11-12;

Br. 10).[7] The argument is without merit. It is sufficient to note that Weisberg had not made his appearance at the time petitioner refused to testify and at the time of commitment. The contempt was then complete. To set aside the contempt judgment on the ground of later occurrences would introduce into the proceeding, which was for criminal contempt under 18 U. S. C. 401 and Rule 42 (a) of the Federal Rules of Criminal Procedure, an element quite foreign to the offense involved.

III

THE COURT BELOW PROPERLY REFUSED TO CONSIDER THE SHOWING MADE ON THE APPLICATION FOR RECONSIDERATION OF BAIL AS PART OF THE RECORD AND PROPERLY REFUSED TO REMAND THE CASE.

Petitioner argues that the showing made to the district court on an application for reconsideration of allowance of bail pending appeal was sufficient to sustain his claim of privilege with respect to the questions as to his occupation, and that the court below should have considered it in support of the privilege or, at least, have remanded the case to the district court in order that the petitioner might have the opportunity of presenting it formally to that court (Br. 8-10).

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[7] The facts as to the appearance of Weisberg are not properly in the record; they appear only in petitioner's briefs. And there is nothing whatsoever in the record or in the Government's brief below to support petitioner's statement (Pet. 12; Br. 10) that "All parties assumed that this group of questions was out of the case."

A bare statement of the sequence of events makes it apparent that the matter presented on the bail application was not properly a part of the record on appeal and was therefore properly stricken. On October 5, 1950, petitioner was found guilty of contempt, was sentenced, applied for bail (which was denied), and filed a notice of appeal (R. 1). On October 6, 1950, the entire record of the proceedings was forwarded to the Court of Appeals, where it was docketed on October 11 (R. 20). On October 20, fifteen days after the appeal had been taken, petitioner filed his application for reconsideration of bail and attached to it the materials which he now asserts should have been considered by the Court of Appeals. It should further be noted that at the time of this application the five day period allowed by Rule 33 of the Federal Rules of Criminal Procedure for applying for a new trial in the district court had expired. Thus the district court had no authority to treat the motion as a motion for a new trial.

The Court of Appeals was, of course, required to consider the case on the basis of the record made below. *Edwards* v. *United States*, 312 U. S. 473. Since the matter had not been a part of the record on which the district court had found the petitioner in contempt, it was entirely proper for the court to strike the matter from the record. Rule 39 of the Rules of Criminal Procedure.

The question then arises whether the court, since the matter had been brought to its attention, although informally, should have remanded the case to the district court in order that the showing might there be made. We submit that there was clearly no abuse of discretion in refusing to do so.

In essence, the request for remand amounts to no more than an assertion that petitioner believes that he can try his case better if he is given another chance. This is not a case of newly discovered evidence. It is merely a situation where petitioner, as was his right, chose not to present certain facts to the court below,[8] and, having been unsuccessful in the first trial, would like to have an opportunity to see if he would have better luck if he tried the case in another manner. There are always questions of trial technique facing a defendant, always questions of judgment whether it will help or hurt him to present various matters to the court. If the fact that he later wished to reconsider his prior unsuccessful strategy were ground for a remand, there would never be any end to litigation.

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[8] The record indicates that the court stated on October 4 that it had no background knowledge on which it could assume a real danger to petitioner (R. 19). Therefore petitioner was clearly not justified in assuming that the court was aware of the facts later furnished (Br. 8). The contempt trial was not held until the next day and the petitioner had the opportunity at that time to lay before the court the background which the court had stated was necessary.

Petitioner clothes his argument in terms of waivers of rights and cites *Johnson* v. *Zerbst*, 304 U. S. 458, to support him (Br. 9). While any choice between alternative courses of action is in a sense a waiver of the courses not adopted, there is no resemblence between such a choice and the waiver of a constitutional privilege such as was referred to in the *Johnson* case. Far from waiving his constitutional rights against self-incrimination, petitioner has been stoutly asserting them throughout.

Finally, even if it be assumed that there would have been reason to remand the case for a new trial, if the questions concerning the petitioner's occupation were the only ones concerned, there was no basis for a remand in the present case because the additional showing had little, if any, relevance to the questions relating to Weisberg. As pointed out above (page 22, *supra*) the conviction would have had to be sustained if petitioner had no privilege to refuse to answer any of the questions asked him. On this ground alone, the court below properly refused to remand the case.

CONCLUSION

For the foregoing reasons, the conviction of contempt should be affirmed.

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